

**PUBLIC HEALTH COUNCIL - SPECIAL EMERGENCY
MEETING OF OCTOBER 10, 2001**

Special Emergency Meeting of the Public Health Council, Wednesday, October 10, 2001, at 10:00 a.m., Massachusetts Department of Public Health, 250 Washington Street, Floor 2, Boston, Massachusetts. Present were: Dr. Howard K. Koh, (Chairman), Ms. Phyllis Cudmore, Ms. Shane Kearney Masaschi, Ms. Maureen Pompeo, Ms. Janet Slemenda and Dr. Thomas Sterne. Mr. Manthala George Jr. and Mr. Benjamin Rubin absent. (One Vacancy) Also in attendance was Ms. Donna Levin, General Counsel.

Chairman Koh announced that notices of the meeting had been filed with the Secretary of the Commonwealth and the Executive Office of Administration and Finance, in accordance with the Massachusetts General Laws, Chapter 30A, Section 11A1/2.

**REQUEST FOR APPROVAL OF EMERGENCY AMENDMENTS TO
105 CMR 950.000: CRIMINAL OFFENDER RECORD CHECKS:**

Deputy Commissioner Paul Jacobsen presented the Request for Approval of Emergency Amendments to 105 CMR 950.000: Criminal Offender Record Checks. Mr. Jacobsen said in part, "...On November 21, 2000 and subsequently on February 27, 2001, and May 29, 2001, the Public Health Council approved requests to adopt regulations on an emergency basis entitled Criminal Offender Record Checks (105 CMR 950.000). The public hearing to receive comments on these regulations was held on January 19, 2001. On August 21, 2001, the Council adopted these regulations, with revisions, as final regulations. The purpose of the regulations is to establish standardized procedures for the Department of Public Health and its contracted vendors with respect to the review of criminal records of candidates for employment or regular volunteer or training positions. The regulations require the Department and programs funded by the Department to request criminal offender record information (CORI) for every candidate who will have the potential for unsupervised contact with program clients, and to review that information to determine if the individual is appropriate to be hired under the guidelines set out in the regulations."

Mr. Jacobsen continued, “The **current regulations** establish four categories of criminal offenses that might show up on a CORI check: mandatory disqualification, ten-year presumptive disqualification, five-year presumptive disqualification and discretionary disqualification:

- In the event that a candidate for employment of a volunteer or trainee position has a mandatory disqualification, that candidate will be ineligible for any position that involves potential or unsupervised contact with a client of a program operated or funded by the Department.
- Candidates with a 5-or 10-year presumptive disqualification may be eligible for positions involving potential unsupervised contact with clients, but only after the 5 or 10 year period has passed or the candidate’s probation officer, parole officer or other criminal justice official, or qualified mental health professional concludes in writing that the candidate is appropriate for the position. Further, the hiring authority must then conduct a review to determine that the candidate does not pose a danger to clients.
- An individual with a discretionary disqualification may be eligible for a position involving potential unsupervised client contact only after the employer conducts a review to determine that the candidate does not pose a danger to clients.”

Further, Mr. Jacobsen said, “Prior to adoption of the emergency regulations by the Department and the other EOHHS agencies, several individuals challenged the validity of the EOHHS policy on criminal background checks which predated the regulations, and served as the basic model for the regulations. The case, which was filed in Superior Court, is entitled Cronin et al. vs. O’Leary. On August 9, 2001, Superior Court Judge Ralph D. Gants reviewed the emergency regulations promulgated by the agencies and ruled on one part of the case concerning whether it was constitutionally permissible to have a mandatory lifetime disqualification from employment in EOHHS human services positions. Judge Gants ruled that this type of disqualification deprived plaintiffs of a constitutional liberty interest, and found that individuals who had been convicted of crimes on the mandatory list were entitled to an opportunity to rebut the presumption that they pose too great a danger to work with human service clients. Specifically, he ruled that two of the plaintiffs in the case who were in the mandatory

disqualification category to have a ‘fair opportunity to rebut the inference that, because of their prior convictions, they pose an unacceptable risk to EOHHS clients’ and that this opportunity be provided no later than October 12, 2001....

The Department was recently informed by the Executive Office of Health and Human Services that this ruling is not going to be appealed, and that the Secretariat, and agencies within the Secretariat, will amend the current CORI regulations to comply with the ruling. Consequently, the Public Health Council is being requested to adopt amendments to the current regulations which replace the mandatory disqualification with a lifetime presumptive disqualification. Individuals in the lifetime presumptive disqualification category will now have the same opportunity for consideration for employment upon a positive assessment by a qualified mental health professional or criminal justice official, and review by the hiring authority. The current regulations contain a waiver provision which allows the Department to grant an exemption from the requirements relating to the 10 and 5-year presumptive categories to a vendor agency program, when the Department determines that the exemption is warranted on the basis of consideration of the following criteria:

- The service needs and level of vulnerability of the clients served by the program
- The potential benefits and risks to those clients as a result of the exemption
- The hiring authority’s capacity to perform the review required under the discretionary exemption provisions of the regulations

Programs which serve clients 16 years of age or under or a population that is primarily 65 years of age or older are not eligible for the waiver.”

Mr. Jacobsen continued, “This waiver provision did not apply to individuals convicted of a crime in the mandatory disqualification category and will not apply under the proposed emergency regulations to these individuals who would now be in the presumptive lifetime disqualification category. Two additional sections were revised to cover potential gaps in the implementation of the regulations. Section 950.102 has been revised to ensure that a candidate is asked to give consent for appropriate individuals to review CORI findings as required in the regulations. Section 950.204 has been revised to include a process for determining if any given offense which

is not included in any of the categories is similar to, and should be considered to be, one of the included offenses.”

Mr. Jacobsen concluded, “...The Public Health Council is respectfully requested to adopt the attached amendments to the current regulations (Attachment II) as emergency regulations. Promulgation on an emergency basis is necessary in order to comply with the October 12, 2001 timeframe required by the decision in the Cronin case and to ensure the effective implementation of these regulations. These amendments are consistent with the regulations which are being promulgated by the Executive Office of Health and Human Services and the other agencies within the Secretariat. These amendments will be effective for a period of 90 days during which time a public hearing will be held to receive comments and staff will return to the Public Health Council for approval of final regulations.”

Note – For the record, three sheets were replaced in Attachment II. The changes were pages 1, 4, and 5.

After consideration, upon motion made and duly seconded, it was voted unanimously to **approve the Request for Approval of Emergency Amendments to 105 CMR 950.000: Criminal Offender Record Checks**; that a copy of the emergency amendments be forwarded to the Secretary of the Commonwealth; and that a copy of the emergency regulations be attached and made a part of this record as **Exhibit Number 14,723**. After the public hearing, the emergency regulations return to Council for final approval.

The meeting adjourned at 10:20 a.m.

Howard K. Koh, M.D., MPH
Chairman
Public Health Council

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